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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

FRANKI BOLORIN and ROSA RAMOS, Plaintiffs, v. REINER, REINER & BENDETT, P.C., Defendant.	**CASE NO.: 07CV2169 JAH (WMc)** **REPLY MEMORANDUM IN RESPONSE TO OPPOSITION TO PETITION OF CHASE HOME FINANCE LLC TO QUASH DEPOSITION SUBPOENA DUCES TECUM** Date: January 28, 2008 Time: 11:00 a.m. Ctrom: "C"
CHASE HOME FINANCE, LLC, a Delaware limited liability company Petitioner, v. FRANKI BOLORIN and ROSA RAMOS, Respondents.	

Petitioner Chase Home Finance LLC ("Chase") hereby submits the following Reply Memorandum in response to the opposition to petition to quash deposition subpoena duces tecum ("Opposition") of plaintiff/respondent Franki Bolorin ("Bolorin") and Rosa Ramos ("Ramos" and collectively, "Plaintiffs" or "Respondents"):

MEMORANDUM OF POINTS & AUTHORITIES

I. SUMMARY OF ARGUMENT

There is no dispute that the law firm of Reiner, Reiner & Bendett ("Reiner Firm") was retained by Chase to perform legal services relating to foreclosures and bankruptcies for Chase in Connecticut. Despite full knowledge of the existence of attorney-client relationship between Chase and the Reiner Firm, Respondents improperly seek documents protected by the attorney-client privilege. *See*, Exhibit "A" attached to the Petition To Quash Deposition Subpoena Duces Tecum ("Petition").

Although Federal Rules of Civil Procedure ("FRCP") 45(c)(2)(B) states that a person commanded to produce documents must object within 14 days after service or before the time for compliance if such time is less than 14 days, but the law allows for a motion to quash after the 14 days where unusual circumstances exist. The courts have held that unusual circumstances exist where the subpoena is overbroad on its face and exceeds the bounds of fair discovery and the subpoenaed witness is a non-party acting in good faith. *Moon v. SCP Pool Corp.*, 232 FRD 633, 636 (C.D. Cal 2005).

Clearly, unusual circumstances exist here, because the subject subpoena is overbroad on its face and exceeds the boundary of fair discovery. The subpoena asks for the following documents: 1) the retainer agreement with the Reiner Firm; 2) all communications between Chase and the Reiner Firm regarding the Bolorin/Ramos account; and 3) all attorneys' fee payments to the Reiner Firm. All these documents are protected by the attorney-client privilege. Therefore, the subpoena is overbroad and exceeds the boundary of fair discovery, because Respondents are seeking documents that are protected by the attorney-client privilege.

Moreover, FRCP 45(c)(3)(A)(ii) states that a person cannot be compelled to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person. The 100 mile limitation in Rule 45 unequivocally applies both to attending a deposition to testify and to being required to produce documents at a distance more than 100 miles from one's home. *Miller v. Holzmann*, 471 F.Supp.2d 119, 121 (D.D.C.2007). Here, the subpoena was served on the "Keeper of the Records" of Chase at 10790 Rancho Bernardo Road, San Diego, California. The subpoena instructed the Keeper of Records to produce the documents at Law Offices of Joanne S. Faulker, 12 Avon Street, New Haven Connecticut, 06511. *See*, Exhibit "A" attached to the Petition. The subpoena violates the 100 mile rule, because needless to say, Rancho Bernardo, California is more than 100 miles from New Haven Connecticut. Therefore, even assuming Chase waived all privileged, the subpoena cannot be enforced, because it is defective.

Finally, the subpoena under Rule 45 has to be personally served. FRCP 45(b)(1). There is no proof that the subpoena was personally served on Chase. The subpoena's second page (declaration of proof of service) is left blank. *See*, Exhibit "A" attached to the Petition. Under FRCP 45(b)(4), Respondents should be required to file the original proof of service of the subpoena with the Court to demonstrate that the subpoena was properly served on Chase.

For the foregoing reasons, the Petition should be granted and the subpoena should be quashed.

II. THE SUBPOENA IS OVERBROAD AND EXCEEDS THE BOUNDS OF FAIR DISCOVERY

Generally, a nonparty served with a subpoena must object to the subpoena within 14 days after service or before the time for compliance if such time is less than 14 days, FRCP Rule 45(c)(2)(B). However, the law allows for a motion to quash after the 14 days where unusual circumstances exist. Where unusual circumstances exist and for good cause, the failure to act timely will not bar consideration of objections. *Moon v. SCP Pool Corp.*, 232 FRD at 636. "Courts have found unusual circumstances where, for instance, the subpoena is overbroad on its face and exceeds the bounds of fair discovery and the subpoenaed witness is a non-party acting in good faith." *Id.* at 636; *McCoy v. Southwest Airlines Co., Inc.*, 211 F.R.D. 381, 385 (C.D.Cal.2002).

The Reiner Firm was retained by Chase to perform legal services relating to foreclosures and bankruptcies for Chase in Connecticut. See, Declaration of Thomas E. Reardon ("Reardon Declaration"), ¶ 5. Respondents are fully aware of the attorney-client relationship between Chase and the Reiner Firm. On August 18, 2006, Respondents brought a lawsuit against the Reiner Firm and David F. Borrino by filing a complaint with the United States District Court, District of Connecticut, Case No. 06-CV-01295-AWT, entitled *Bolorin et al v. Borinno, Reiner, Reiner &*

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Bendett ("Connecticut Action"). Respondents brought the Connecticut Action for the purported violation of the Fair Debt Collection Practices Act ("FDCPA"), 15 USC § 1692 et seq. *See*, Declaration of S. Christopher Yoo ("Yoo Declaration"), ¶ 4, Exhibit "B." In the Complaint, Respondents admit that Chase is the servicer for Deutsche Bank, and that the Reiner Firm sent legal bills to Chase. *See,* Complaint, ¶¶ 11 and 13, attached as Exhibit "B" to Yoo Declaration.

Despite the knowledge of the existence of the attorney-client relationship between Chase and the Reiner Firm, in the subpoena, Respondents requests the following documents: 1) the retainer agreement with the Reiner Firm; 2) all communications between Chase and the Reiner Firm regarding the Bolorin/Ramos account; and all attorneys' fee payments to the Reiner Firm. All these documents are protected by the attorney-client privilege. *See*, Exhibit "A" attached to the Petition.

The law is clear. Under the attorney-client privilege, confidential communications made by a client to an attorney to obtain legal services are protected from disclosure. *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976); *United States v. Hirsch*, 803 F.2d 493, 496 (9th Cir.1986). "[C]orrespondence, bills, ledgers, statements, and time records which also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law, fall within the privilege." *Clarke v. American Commerce National Bank*, 974, F.2d 127, 129 (9th Cir. 1992).

Clearly, the subpoena is overbroad and exceeds the boundary of fair discovery, because it seeks documents clearly protected by the attorney-client privilege. Respondents knew that the requested documents are protected by the attorney-client privilege. In fact, on December 21, 2006, the Reiner Firm objected to the First Request for Production of Documents in the Connecticut Action. *See*, Exhibit "B" attached to the Petition. The very documents Respondents demand in their subpoena are the subject of Respondents' discovery demands to the Reiner Firm in the Connecticut Action. Respondents are improperly seeking to obtain the documents from Chase despite the knowledge that the Reiner Firm asserted the objection based on the attorney-client privilege.

Respondents have brought a motion to compel in the Connecticut Action to obtain the documents that are demanded in the subpoena. Yoo Declaration, ¶ 3, Exhibit "A." The Reiner Firm filed a response to the motion to compel, and the hearing took place on August 22, 2007. *Id.* The

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District Court in Connecticut has not yet ruled on the motion to compel. *Id.*

Further, it is interesting that in the Opposition, Respondents do not even attempt to explain to the Court why the subpoena is not overbroad and does not exceed the bounds of fair discovery. Respondents don't even explain why they are seeking the documents clearly protected by the attorney-client privilege. Respondents' sole argument is that Chase waived the privileged by failing to object within 14 days of the receipt of the subpoena. *See*, Opposition. Unless Respondents can provide credible and reasonable explanation why Respondents are seeking the documents demanded in the subpoena, the subpoena is clearly overbroad and exceeds the bounds of fair discovery – especially since Respondents are seeking documents protected by the attorney-client privilege.

In conclusion, the Reiner Firm already objected to the documents requested in the subpoena on the basis of attorney-client privilege. Chase's refusal to produce the documents requested in the subpoena is not in bad faith. Chase is merely asserting its legal right not to produce documents protected by the attorney-client privilege. Chase was and is acting in good faith.

III THE SUBPOENA IS INVALID AND VOID, BECAUSE IT EXCEEDS THE ONE HUNDRED MILE RULE

A motion to quash subpoena can be brought if the subpoena compels a person to travel more than "100 miles from where that person resides, is employed, or regularly transacts business in person." FRCP 45(c)(3)(A)(ii). The 100 mile limitation in Rule 45 unequivocally applies both to attending a deposition to testify and to being required to produce documents at a distance more than 100 miles from one's home. The court in *Miller v. Holzmann*, 471 F.Supp.2d at 121 held:

> "T]he limitation in Rule 45 unequivocally applies both to attending a deposition to testify and to being required to produce documents at a distance more than 100 miles from one's home. It draws no distinction whatsoever between being compelled to testify and being compelled to produce documents at a certain place."

Here, the subpoena was served on the "Keeper of the Records" of Chase at 10790 Rancho Bernardo Road, San Diego, California. *See*, Exhibit "A" attached to the Petition. The subpoena instructed the Keeper of Records to produce the documents at Law Offices of Joanne S. Faulker, 12 Avon Street, New Haven Connecticut, 06511. *Id.* The subpoena violates the 100 mile rule, because

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needless to say, Rancho Bernardo, California is more than 100 miles from New Haven Connecticut. In fact, according to mapquest.com, the distance between 10790 Rancho Bernardo Road, San Diego, California and 12 Avon Street, New Haven Connecticut exceed 2,913 miles. Yoo Declaration, ¶ 6.

Again, according to *Miller*, it is irrelevant that the custodian of records would only be required to produce documents and not attend the deposition. Thus, even assuming Chase waived all objections, including attorney-client privilege, for failure to object to the subpoena within 14 days, the subpoena is still defective and therefore, cannot be enforced.

III. RESPONDENTS MUST PROVIDE AND FILE A COPY OF PROOF OF SERVICE

FRCP 45(b)(1) states:

> "Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law…" (Emphasis added.)

FRCP 45(b)(4) states:

> "Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server."

The subpoena under Rule 45 has to be personally served. FRCP 45(b)(1). There is no proof that the subpoena was personally served on Chase. The subpoena's second page (declaration of proof of service) is left blank. *See*, Exhibit "A" attached to the Petition. Under FRCP 45(b)(4), Respondents should be required to file the original proof of service of the subpoena with the Court to demonstrate that the subpoena was properly served on Chase in accordance with FRCP 45.

FRCP 4(h)(1) states that corporations and other business entities can be served in accordance with the law of the state in which the District Court is located in. In this regard, CCP § 416.10 sets forth certain individuals who can be served on behalf of corporations. CCP § 416.10(b) states that the following individuals can be served on behalf of a corporation:

> "To the president, chief executive officer, or other head of the corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a

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controller or chief financial officer, a general manager, or a person authorized by the corporation to receive service of process."

Under federal law, FRCP 4(h)(1) also states that corporations and other business entities can be served by delivering the summons and complaint to an officer, managing or general agent or any other agent authorized by law to accept service.

To the extent that the subpoena was not served on an appropriate individual at Chase, the subpoena is defective for improper service.

IV. CHASE DID NOT VOLUNTARILY OR EXPRESSLY WAIVE OBJECTIONS

Contrary to Respondents' contention in the Opposition, Chase did not expressly agree to produce the documents requested in the subpoena. the June 7, 2007 letter from Chase to Respondents, attached as Exhibit "A" to the Opposition, is a form letter. *See*, Exhibit "A" attached to the Opposition; *see also*, Reardon Declaration, ¶ 6. The purpose of the June 7th letter is to inform the borrowers that a subpoena relating to their mortgage loan has been received by Chase, and that Chase needs to respond to the subpoena. The purpose of the letter is to provide an opportunity for the borrowers to object to the subpoena. The letter does not mean that Chase agreed to produce the documents requested in the subpoena. *Id.*

V. PRIVILEGED LOG IS ATTACHED THIS REPLY MEMORANDUM

Respondents mischaracterize the ruling in *Cunningham v. Connecticut Mutual Life Insurance*, 845 F.Supp. 1403 (S.D. Cal. 1994). *Cunningham* does not stand for the proposition that failure to produce a privilege log does not mean waiver of the privilege. In *Cunningham*, the court ruled that the document that was purportedly protected by the attorney-client privilege and purportedly inadvertently produced by the moving party was not protected by the privilege, because the crime-fraud exception applied.

Moreover, the privilege log is attached to Yoo Declaration as Exhibit "C." Therefore, Chase is in compliance with FRCP 45(d)(2). Moreover, the substantially the same privilege log was previously produced to Respondents' Connecticut counsel in May 2007. Therefore, the privilege log, for all purposes, was previously produced to Respondents.

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VI. THE SOUTHERN DISTRICT HAS THE AUTHORITY TO RULE ON THE PETITION

FRCP Rule 45(c)(3)(A) requires the motion or petition to quash subpoena to be filed in a district where the deposition subpoena was issued. The subpoena in question was issued by the United States District Court, Southern District of California. *See*, Exhibit "A" attached to the Petition.

Clearly, under FRCP Rule 45(c)(3)(A), the Southern District of California has the authority to issue a ruling on the Petition. Moreover, at this time, both parties have fully briefed their respective positions. There is no reason not to issue a ruling.

Chase respectfully requests the Court to rule on the Petition instead of transferring the matter to the Connecticut Court, which will require additional actions by the respective parties.

VII. CONCLUSION

Based on the foregoing, Chase respectfully requests the Court to grant the Petition and quash the subpoena.

DATED: January 18, 2008

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By:__/s/ S. Christopher Yoo____________________
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